Office - Supreme Court, U.S.
FILED
JUN 24 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1256

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

DENNIS M. LYNCH, ET AL.,
PETITIONERS
V.
DANIEL DONNELLY, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

DAVID CRUMP
PROFESSOR OF LAW,
SOUTH TEXAS COLLEGE OF LAW
AND
PRESIDENT,
THE LEGAL FOUNDATION OF AMERICA
1303 SAN JACINTO
HOUSTON, TX 77002
(713) 659-8040

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

I. THIS CASE DOES NOT INVOLVE A PUBLIC SCHOOL SETTING, AND IT DOES NOT INVOLVE INVIDIOUS DISCRIMINATION AGAINST ANY RELIGION. THE CASES CITED BY THE COURT OF APPEALS THEREFORE DO NOT FURNISH A RELIABLE GUIDE HERE. 3

A. The present case does not involve a "captive audience," does not include any indoctrinative or teaching function, and does not present a "religious ceremony." Therefore, public school cases are inapposite. 3

B. The case does not involve invidious discrimination against any religion. 5

II. THE CITY'S ACTIONS IN THIS CASE AMOUNT TO AN "ACCOMODATION" OF (OR "NON-DISCRIMINATION" AGAINST) RELIGION, RATHER THAN AN ESTABLISHMENT OF RELIGION. 6

III. WHILE THE CONCERNS OF PLAINTIFFS AND THEIR AMICI, CENTERING UPON POTENTIAL DISCRIMINATION AGAINST PARTICULAR RELIGIONS, APPROVAL OF A PARTICULAR RELIGION, PSYCHOLOGICAL INFLUENCES UPON PERSONS OF OTHER RELIGIONS, AND INTERFERENCE WITH MENTAL PRIVACY, ARE SUBSTANTIAL AND VALID CONCERNS, THE

DISPLAY IN QUESTION HERE SHOULD BE HELD LAWFUL PRECISELY BECAUSE IT DOES NOT OFFEND THOSE CONCERNS 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Citizens Concerned for Separation of Church and State v. Denver, 526 F. Supp. 1310 (D. Colo. 1981) 4, 9

Engel v. Vitale, 370 U. S. 421 (1962) 6

Florey v. School Dist., 619 F.2d 1311, 1317 n. 5 (8th Cir. 1980) 4, 5, 8

Larson v. Valente, 102 S. Ct. 1673 (1982) passim

Lemon v. Kurtzman, 403 U. S. 602 (1971) 3, 8, 10, 12

School District v. Schempp, 374 U. S. 203 (1963) 4, 5, 6, 10

Stone v. Graham, 449 U. S. 39 (1980) 4, 5

Widmar v. Vincent, 454 U. S. 263 (1981) 6, 8, 9

Zorach v. Clauson, 343 U. S. 306 (1952) 6, 7, 11

SECONDARY AUTHORITIES

W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 1163 (1980) 6

NO. 82-1256

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

DENNIS M. LYNCH, ET AL.,
PETITIONERS
V.
DANIEL DONNELLY, ET AL.,
RESPONDENTS

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm. Its goals include preservation of the market system of resource allocation, removal of unreasonable regulation, attainment of a better balance between the federal government and the states, and preservation of a rational system of criminal justice. LFA's interest in the case at bar results from the prospect of federal intervention that LFA respectfully submits will have counterproductive effects in State and local governments.

All litigation undertaken by LFA is approved by its Board of Trustees, a majority of whom are attorneys. LFA does not receive private fees but is supported by contributions.

SUMMARY OF ARGUMENT

I.

The context of this case differs radically from that of other recent decisions of this Court, including those relied upon by the

Court of Appeals. Public school cases furnish an unreliable guide since this case does not involve "coercion" of a captive audience, does not involve the "teaching" function of the State, and does not involve a "religious ceremony." Larson v. Valente is inapposite because the factor of invidious discrimination against particular religions, which was crucial to that case, is not present in this case.

II.

The case actually involves an "accomodation" of (or more appropriately, "non-discrimination" against) religion, rather than an "establishment" of religion.

The options available to a city such as Pawtucket include, first, extirpating all reference to the Christmas holiday, "root and branch" (which is not a realistic approach); secondly, exalting the secular aspects of the holiday while carefully removing all religious aspects (the approach of the Court of Appeals); or, thirdly, recognizing traditional symbols of the season without content-based discrimination (the approach of the City of Pawtucket).

The option chosen by the Court of Appeals—that of emphasizing the secular aspects of Christmas while censoring the religious—would cause real harm, for several reasons. It would require content-based discrimination, which would be difficult to administer because most symbols of Christmas are ultimately religious in origin. The resulting transformation of the holiday would involve government in a misleading, even dishonest act and thereby demean the institutions of government itself. It would interfere directly in the task of religious institutions, since it would give apparent government approval to the replacement of their interpretations of Christmas with the exaltation of the secular. And it would threaten and insult those who celebrate Christmas as a religious holiday by an official denial of the aspects they cherish most. Such an approach would not be "neutral" toward religion; it would fail the test of "neither advancing nor inhibiting religion."

III.

The concerns of plaintiffs and their amici are valid concerns; however, it is submitted that the display at issue simply does not offend those concerns. The potential for state discrimination against particular religious beliefs, though real, is not present in this case; and the nature of this display is such that it does not involve the promotion of religion, denial of religion, or interference with mental privacy of persons of any religious belief.

I. THIS CASE DOES NOT INVOLVE A PUBLIC SCHOOL SETTING, AND IT DOES NOT INVOLVE INVIDIOUS DISCRIMINATION AGAINST ANY RELIGION. THE CASES CITED BY THE COURT OF APPEALS THEREFORE DO NOT FURNISH A RELIABLE GUIDE HERE.

The Court of Appeals relied principally upon two cases, Lemon v. Kurtzman, 403 U. S. 602 (1971), and Larson v. Valente, 102 S. Ct. 1673 (1982). However, the context of this case is radically different from those cases, and they furnish an unreliable guide here.

A. The present case does not involve a "captive audience," does not include any indoctrinative or teaching function, and does not present a "religious ceremony." Therefore, public school cases are inapposite.

Pupils in a public school are a captive audience. They are forced to attend and to participate. In the present case, however, the audience is not captive in any sense, nor is it coerced. Persons not desiring to recognize the Christmas holiday can avoid the entire exhibit, and if some persons desire to celebrate the holiday, but wish to celebrate only its secular aspects, there is no greater offense if they should happen accidentally to see the creche than would result from the brief glimpsing of a creche in

any other location.[1] The interest in avoiding such sights is not of constitutional magnitude.

Furthermore, the primary function of public schools is to teach. This mission includes the judicially recognized duty to indoctrinate children in the culture, customs, values, and morals of our people. The indoctrinative mission arguably presents a different case for surgically excising religious elements from the public school context. The purpose of this display, however, was to promote enjoyment of Christmas, not to indoctrinate. In fact, the seeing of traditional religious symbols of Christmas within a dominant secular display is at least as likely to promote pluralistic values or to secularize religion as it is to promote religion.[2] This display was set up so that persons of all faiths—whether Catholic, Protestant or Jewish, Muslim or Baha'i, agnostic or atheist—could attend and enjoy it if they wished to observe the holiday at all. The prospect that sectarian purposes of any religious group might be advanced by it is remote in the extreme.

Finally, this was not a religious "ceremony," such as was involved in School District v. Schempp, 374 U. S. 203 (1963) (the school prayer case), nor did it emphasize the religious element in a religious context, as in Stone v. Graham, 449 U. S. 39

---

1 The only difference is the legal issue involved in this very case, and the offense that might be taken by some from the resolution of a constitutional question, although real, simply cannot be allowed to affect the outcome.

2 Thus in Citizens Concerned for Separation of Church and State v. Denver, 526 F. Supp. 1310 (D. Colo. 1981), testimony was offered both by sincere Christians who felt the display demeaned the Christian religion and by non-Christians who argued that it promoted the Christian religion. See also Florey v. School Dist., 619 F.2d 1311, 1317 n. 5 (8th Cir. 1980). To some extent, the alleged "promotion" of Christianity and the alleged "diminution" of Christianity cancel each other. Admitting for purposes of argument, however, that each effect may take place in different people, Amicus would respectfully submit that the possibility of appreciable effect on the membership or beliefs of any sect from this display is remote.

(1980) (the Ten Commandments case). As Justice Brennan's opinion in Schempp indicates, even Bible readings in public schools are proper if done neutrally in the course of comparative religion or literature study. See also Florey v. School Dist., 619 F.2d 1311, 1314 (8th Cir. 1980). For example, a literature book with predominantly secular works but including excerpts from the King James Bible is not unconstitutional, even in public schools. The display in this case commemorates a holiday shared by all, and its inclusion of religious elements in a dominantly secular context, all traditional and appropriate to the season, is analogous to the literature book containing Bible verses as literature. (It should be emphasized, however, that this display is on stronger constitutional ground since it did not appear in the school context at all).

B. The case does not involve invidious discrimination against any religion.

The discriminatory treatment of minority religions condemned in Larson v. Valente, 102 S. Ct. 1673 (1982), is also absent from the present case. In Larson, there was active, purposeful, invidious discrimination against certain religions of which the legislature disapproved. The legislative history in Larson showed affirmatively the legislative intent to disadvantage these disliked sects and even included several legislators' hostile characterization of the enactment as an effort to "get at" certain religions, to "deal with" certain kinds of sects, or to "regulate the Moonies." Id.

The present case is fundamentally different. The inclusion of the creche in the present case was not an effort to disadvantage any religion or "get" the adherents of any faith. Indeed, the principles of Larson would be violated if the creche were to be censored because of its religious content; the result then would be government appropriation of a holiday with religious significance coupled with purposeful exclusion of certain traditional symbols inextricably connected with the holiday, precisely because of the religious content. Such a content-based distinction would discriminate against the religious, denigrate the significance of the holiday itself to those that celebrate it, and insult

practitioners of the faith involved.[3]

The Court of Appeals interpreted Larson v. Valente as requiring the excision of all influences that might pertain to any one religion from public life. Such an excision would be impossible to achieve. The effort to achieve it would be counterproductive and harmful.[4] This Court has had frequent occasion to note the degree to which the influence of religious symbols is woven into our culture.[5] Larson does not require that the cultural fabric be unravelled to extirpate all reference to religion; instead Larson signifies that invidious discrimination against religious sects is prohibited.

II. THE CITY'S ACTIONS IN THIS CASE AMOUNT TO AN "ACCOMODATION" OF

---

3 See section II of this Brief infra.

4 Because religious influences are inextricably interwoven with our public life, see note 5 infra, it is nearly always impossible to insist on excising them completely and absolutely, without doing harm to other rights or interests.

For example, in one case, a school carefully banned spontaneous voluntary prayer activities in unused school rooms. This ban was part of an honest and conscientious effort to censor the religious to avoid establishment; this Court appropriately held, however, that it amounted to an unconstitutional infringement on the rights of the affected students to free expression. Widmar v. Vincent, 454 U. S. 263 (1981). The present case involves slightly different, but equally significant, kinds of harm that would flow from an "absolutist" approach. See section II of this Brief infra.

Absolutism is inappropriate in establishment-clause and free exercise-clause cases. "It is difficult to explore the implications of either of these clauses in complete isolation from the other . . . . [because] the two clauses interact . . . ." W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1163 (1980).

5 See, e.g., School Dist. v. Schempp, 374 U. S. 203 (1963) ("It is true that religion has been closely identified with our history and culture"); Engel v. Vitale, 370 U. S. 421 (1962) ("The history of man is inseparable from the history of religion"); Zorach v. Clauson, 343 U. S. 306 (1952) ("We are a religious people whose institutions presuppose a Supreme Being").

(OR "NON-DISCRIMINATION" AGAINST) RELIGION, RATHER THAN AN ESTABLISHMENT OF RELIGION.

The City of Pawtucket has three essential options with respect to Christmas: first, it can carefully censor all references to the holiday, "root and branch;" secondly, it can excise all religious symbolism and confine its recognition of Christmas only to secular symbols; or, third, it can recognize traditional symbols of Christmas without discriminating on the basis of content against either those that are religious or those that are secular in significance.

The first option—that of removing Christmas from the City's lexicon altogether—was actually suggested by the district court in this case. It is not, however, a real option at all. At the very least, merchants will rightly insist that the City address their needs, and in countless other City activities the existence of the holiday must be recognized. [6]

---

6 The most famous statement of the interrelationship of City functions and the religious is that of Mr. Justice Douglas, in Zorach v. Clauson, 343 U. S. 306, 312 (1952):

> The First Amendment, however, does not say that in every and all aspects there shall be a separation of Church and State. . . . That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this honorable Court."

The second option consists of an exaltation of the secular as the "true" aspect of Christmas, coupled with systematic extirpation of the religious. This approach amounts to content-based discrimination against the religious solely because it is religious.[7] The approach of excising traditional religious symbols on the basis of their content is condemned by the reasoning of Larson v. Valente and is likely to be counterproductive to first amendment values for several reasons.

First, the current holiday is itself religious in origin. Such traditional symbols as trees, bells and Santa Claus have religious origins, and they still retain religious significance to some people. The next step in the reasoning of the Court of Appeals is that public references to St. Nicholas would become unconstitutional.

And what if municipal employees want to have a Christmas party, or sing carols, no differently than other employees in private businesses? Cf. Florey v. School Dist., 619 F.2d 1311 (8th Cir. 1980):

> Today, carols are sung with regularity on public and commercial television and are played on public address systems in offices, manufacturing plants and retail stores in every city and village. See T. Coffin, The Book of Christmas Folklore (1973); R. Myers, Celebrations, The Complete Book of American Holidays; 5 Encyclopedia Americana 693 (International ed. 1968).
>
> Many carols have a religious theme; some do not. As in the centuries gone by, some persons object to the singing of carols with a religious basis in any place but the church or home because they feel that to do so debases religion; others have the same objection but because they feel it enhances religion. We take no part in this argument, it being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district.

Id. at 1316-17 n. 5.

7 This Court has had several occasions in which to condemn "content-based" distinctions among items of religious significance. E.g., Lemon v. Kurtzman, supra, 403 U. S. at 620; Larson v. Valente, supra, 102 S. Ct. at 1688; Widmar v. Vincent, supra, 454 U. S. at 263.

Litigation like the case at bar would proliferate as the identification of other symbols in the mind of some with their particular religious traditions would similarly make their inclusion unlawful.[8] In short, it is impossible to excise religious symbolism neatly and surgically from Christmas.

Secondly, for government to appropriate Christmas and change its traditions in order to fit governmental purposes is a misleading, even dishonest act, that denigrates government itself. As Judge Campbell said in dissenting from the decision below, "It seems a little like maintaining a holiday known as 'Washington's birthday' while extirpating all reference to George Washington. . . . [The excision] has an almost Orwellian twist."[9] The City of Pawtucket should not be forced to engage in such conduct.

Third, it is quite clear that such an approach—exalting the secularized aspects of the holiday while systematically excising all symbols that some people cherish most about it—is demeaning, even alarming, to those whose religion is thus denied by government. To such people, this approach is felt as hostile and discriminatory.[10]

---

8 See authorities cited in note 6, supra. "[To] determine which words and activities fall within 'religious worship and religious teaching' . . . could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" Widmar v. Vincent, supra at n. 11.

9 Amicus does not argue, of course, that the harm done by this case bears any relationship to that done by Orwell's fictional government. The harm is primarily in making the government participate in a charade that degrades its institutions, making them appear silly.

10 In Citizens Concerned for Separation of Church and State v. Denver, 526 F. Supp. 1310, 1314 (D. Colo. 1981), which involved a similar display, the court admitted into evidence several packets of letters to public officials from citizens on the ground such letters showed the state of mind of citizens with respect to the display. The court found that "removal of the nativity scene would be viewed by [the letter writers] as endorsement by the City of a position inimical to

The final reason against this option, and the most compelling, is that it would not be "neutral" as to religion. Today, as in the past, commercial activity threatens to frustrate the legitimate purposes of religious institutions at Christmas. Clergy expend considerable effort to counteract what would otherwise be a commercial appropriation of the observance. They must work every year to remind practitioners that the meaning of Christmas within their institutions is not properly exemplified by its secularized aspects, such as wreaths, gifts or sales volumes. The exaltation of implicitly "approved" secularized and pagan symbols by government threatens this function. At the same time, the intentional excision of other, equally traditional symbols solely on the basis of their religious content amounts to an official denial of religion. This approach is actually hostile, not neutral, toward religion. If a government practice must "neither advance nor inhibit religion," Lemon v. Kurtzman, supra, then distinctions in the displaying of traditional symbols solely because of differences in content fails the test.[11]

As Mr. Justice Goldberg wrote in School District v. Schempp,

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

---

their faith." The most common state of mind, the court found, "was anger." These are the reactions of persons who believe they are threatened with content-based regulation and who feel the applicable distinctions as invidious discrimination.

11 Such "content-based" distinctions have frequently been criticized by this Court. See note 6 supra and accompanying text.

That is what has happened in this case.

It must be recognized that "accomodation" of religion, in which government tolerates and indeed refrains from discriminating against religion, is not the same as establishment of religion. Cf. Zorach v. Clauson, 343 U. S. 306 (1952) (Douglas, J.) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. *For it then respects the religious nature of our people and accomodates the public service to their spiritual needs*") (emphasis added). Accomodation and nondiscrimination with respect to the religious is the third option described above, and that is the course chosen by the City here.

III. WHILE THE CONCERNS OF PLAINTIFFS AND THEIR AMICI, CENTERING UPON POTENTIAL DISCRIMINATION AGAINST PARTICULAR RELIGIONS, APPROVAL OF A PARTICULAR RELIGION, PSYCHOLOGICAL INFLUENCES UPON PERSONS OF OTHER RELIGIONS, AND INTERFERENCE WITH MENTAL PRIVACY, ARE SUBSTANTIAL AND VALID CONCERNS, THE DISPLAY IN QUESTION HERE SHOULD BE HELD LAWFUL PRECISELY BECAUSE IT DOES NOT OFFEND THOSE CONCERNS.

The arguments made here are not in derogation of the concerns expressed by the plaintiffs. The power of the State can be used, and historically has sometimes been used, to support a state religion or to suppress the beliefs or practices of others. It is submitted, however, that this case simply does not present such a situation. [12]

---

12 Plaintiffs and their amici may well argue that, since other cities in other cases in the future may infringe their interests more deeply, the present case is the one in which to draw a line—to "nip the

It does not present it, first, because the inclusion of the creche here was done merely because it was a traditional symbol of Christmas, not for any establishmentarian purpose or with establishmentarian effect. Secondly, this display—taken as a whole, as it must be for constitutional purposes—could be enjoyed by any person desiring to celebrate the holiday, whatever his or her faith or lack thereof. Finally, excision of the creche would itself be a harmful and counterproductive discrimination on religious grounds. These considerations should affect the Court's application of the three-pronged Lemon v. Kurtzman test, which itself is an effort at balancing the need to avoid establishment with the need for accomodation.

CONCLUSION

The decision of the Court of Appeals should be reversed. This Court should articulate a standard for cases of this nature recognizing that the public school context and invidious discrimination cases present different issues. At the same time, the Court should recognize the concerns of plaintiffs and their amici as legitimate, and should protect against displays that might insult any religion.

Respectfully submitted,

---

establishment of religion in the bud," if only to avoid having to litigate the same sort of issue repeatedly in every such case. Although there is room for sympathy with such a point of view, the fact is that it is impossible in any one case to draw a permanent, universally applicable line in so complex and inherently conflicting an area as this. To put the matter differently, one cannot "nip an establishment of religion in the bud" without the risk of harm to other valid interests. See notes 3-6 supra and accompanying text. Furthermore, the context-based distinctions urged by plaintiffs and their amici may themselves lead to a proliferation of new litigation. See note 8 supra.

David Crump
Professor of Law,
South Texas College of Law
and
President,
The Legal Foundation of America
1303 San Jacinto
Houston, TX 77002
(713) 659-8040